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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 327

KENNETH R. RICKEY, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	3
Statement	3
A. Functions of Intelligence Division and of Special Agents	3
B. Petitioner's conferences with Internal Revenue Agent Barr	5
C. Petitioner's conference with Special Agent Mott	6
D. Special Agent Mott's use of a concealed tape recorder	7
E. Petitioner's 1961 tax deficiency	9
F. The ruling below	10
Reasons for granting the writ	11
Conclusion	17
Appendix A—Opinion below	A1
Appendix B—Opinion in *Kohatsu* case relied on by the court below in present case	A2
Appendix C—Judgments below	A15
(1) Judgment of affirmance	A15
(2) Order denying rehearing	A15
Appendix D—Statutes and regulations involved	A16

AUTHORITIES

CASES:

Application of Bodkin, 165 F. Supp. 25, appeal dismissed, 266 F. 2d 55 14
Escobedo v. *Illinois*, 378 U.S. 478 ..... 11, 12, 14, 16
Kohatsu v. *United States*, 351 F. 2d 898, certiorari denied, June 20, 1966 (No. 965, last Term) .. 11, 14, 15, A2

Page

Lopez v. *United States*, 373 U.S. 427 15
Miranda v. *Arizona*, decided June 13, 1966 (No. 759, last Term) 11, 14, 16
On Lee v. *United States*, 343 U.S. 747 15
Osborn v. *United States*, No. 29, this Term, certiorari granted, 382 U.S. 1023 15
United States v. *Frank*, 245 F. Supp. 284, certiorari denied, 355 U.S. 819 14
United States v. *Guerrina*, 12 F. Supp. 126, modified, 126 F. Supp. 609 14
United States v. *Lipshitz*, 132 F. Supp. 519 ..... 14, A16
United States v. *Sclafani*, 265 F. 2d 408, certiorari denied, 360 U.S. 918 14
United States v. *Wolrich*, 129 F. Supp. 528, modifying 119 F. Supp. 538 14

STATUTE:

I.R.C. 1954, § 7201 ..... 12, A16

MISCELLANEOUS:

The Constitutional Right to Counsel in Tax Investigations, 33 U. of Chi. L. Rev. 134 11

Internal Revenue Service, Organization and Functions, ¶ 1118.6, 26 Fed. Reg. 6372, 6393 ..... 4, A17

Manual of Instructions for Internal Revenue Agents, ¶ 678 ..... 4, 13, A16

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH R. RICKEY, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on March 16, 1966.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra,* p. A1) is reported at 360 F. 2d 32. The opinion of the court below in *Kohatsu* v. *United States,* which it followed in this case, is reported at 351 F. 2d 898, and is set forth in Appendix B, *infra,* pp. A2-A14.

JURISDICTION

The judgment of the court below (Appendix C(1), *infra*, p. A15) was entered on March 16, 1966. A timely petition for rehearing was denied on June 2, 1966 (Appendix C(2), *infra*, p. A15). On June 17, 1966, the time for filing a petition for certiorari was extended by the Chief Justice to and including August 1, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

An Internal Revenue Agent, having discovered that a taxpayer had admittedly failed to declare a substantial amount of income, suspected willfulness (and hence criminality). Accordingly, the case was turned over to a Special Agent of the Intelligence Division, who took charge under the provisions of an Internal Revenue Service *Manual*, superseding the Revenue Agent. The Special Agent was represented as the Revenue Agent's superior, which he was not except by virtue of the IRS *Manual*, of whose provisions the taxpayer was not advised. The Special Agent then questioned the taxpayer, admittedly in order to obtain incriminating statements from him, at a meeting where, advisedly concealed from the taxpayer (who was completely ignorant of the fact), a hidden microphone connected with a tape recorder operated by another Special Agent took down what the taxpayer said. The first Special Agent did not advise the taxpayer of any right to counsel, and, while interrogating the taxpayer, carefully refrained from using the words "criminal," "prosecution," or "fraud." In consequence of the interrogation, there was obtained a signed question-and-answer statement, and the Special Agent subsequently used the tape recording to establish inconsistencies in explanations made by the taxpayer later in the same interview.

The question presented is whether the admission into evidence of any of the statements thus obtained violated the taxpayer's Sixth Amendment rights.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are set out in Appendix D, *infra*, pp. A16-A17.

STATEMENT

Petitioner was indicted in two counts for filing allegedly false income tax returns for the years 1960 and 1961 respectively (R. 2-3).[1] Following a jury trial (R. 14) at which the deficiencies were admitted by stipulation (Tr. 650-651) and only willfulness was in issue, he was acquitted on the First Count, involving an understatement of taxable income for the year 1960 in the amount of $36,127 and a consequent understatement of tax liability aggregating $18,063 (R. 2-3; Ex. 36), and convicted on the Second Count, where the understatement of income for the year 1961 was $14,660.40 and the understatement of tax liability $7,036.29 (R. 3; Ex. 37).

Nothing turns on the details except as they bear on the circumstances under which petitioner made statements to Special Agent Mott on May 14, 1962 (Ex. 30; Tr. 312-316, 318-338; Tr. 341), the admissibility of which raises the only question presented by this petition.

A. Functions of Intelligence Division and of Special Agents

Indispensable to an understanding of this case is the difference in function between the Internal Revenue Agent and the Special Agent.

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[1] "R." refers to the Clerk's typewritten file of court papers, "Tr." to the testimony at the trial. The case was heard in the court below on an unprinted record. The prosecution's exhibits were numbered, petitioner's were lettered.

The statement that follows relies primarily on the testimony of the prosecution's witnesses. Petitioner's testimony (Tr. 280-296 on *voir dire;* Tr. 423-626 as a witness before the jury) is cited only by way of corroboration, or, in a few instances, where it was not contradicted by the prosecution's proof.

The Internal Revenue Agent performs audit work to determine the amount of tax due as a civil obligation (Tr. 174). The Special Agent "works on criminal matters" (Tr. 6), and is a part of the Intelligence Division, which "investigates alleged criminal violations of the tax statutes" and "evaluates allegations and indications of tax law violations and determines investigations to be undertaken" (IRS Organizations and Functions, ¶1118.6; Appendix D, *infra*, p. A17).

When, as here, there is a joint investigation, it is the Special Agent who is in charge. After that, the Internal Revenue Agent is subordinated to the Special Agent, to such an extent that the former has no further contact with the taxpayer without the Special Agent's approval. Paragraph 678, *Manual of Instructions for Internal Revenue Agents* (Appendix D, *infra*, p. A16); *accord*, Tr. 214, 268, 269.

The testimony of Special Agent Mott in this case corroborated the provisions of the organization description and of the *Manual*: The purpose of the Intelligence Division is to investigate possible criminal violations (Tr. 267, 359). Here the omission of substantial amounts from the taxpayer's return (found by Internal Revenue Agent Barr) raised the possibility of willfulness (Tr. 251), and it was accordingly the job of Adrian, an Internal Revenue Supervisor, to contact Special Agent Mott (Tr. 357). Petitioner's case was accordingly turned over to Mott for evaluation, because of the possible criminal violation (Tr. 358). At that point Special Agent Mott was in control (Tr. 214, 268, 361). He accordingly told Internal Revenue Agent Barr to suspend his work (Tr. 269, 362), and to telephone petitioner to have him come to the office of the Intelligence Division (Tr. 235, 252, 361). At this time, Barr's office was at 180 New Montgomery Street, San Francisco (Tr. 219), while Mott's was with the Intelligence Division at 100 McAllister Street (Tr. 226-227, 363). When petitioner arrived, Special Agent Mott advised that he was

in charge (Tr. 336), and indeed he put all the questions to the petitioner (Ex. 30; Tr. 318-334).

Special Agent Mott admitted quite frankly (Tr. 359) that "we want to concentrate our time on cases that may be prosecution cases," and, with respect to the purpose of his May 14 meeting with the petitioner (Tr. 253)—

> "Q. And this was for the purpose, was it not, if possible, of obtaining statements which might be incriminating?
>
> "A. Yes, if possible, yes, yes."

B. Petitioner's conferences with Internal Revenue Agent Barr

On April 26, 1962, Internal Revenue Agent Barr met with petitioner in connection with checking the latter's 1960 tax return (Tr. 175-176). Barr found discrepancies in the dividends reported (Tr. 195), a result of petitioner's having included in his 1959 rather than his 1960 return a dividend declared in December 1959 but not received until January 1960 (Tr. 209-213). While Barr was present, the additional tax due was calculated, an amended return was executed, and a check for the balance delivered (Tr. 180, 223).

In consequence of a letter from Barr setting forth additional discrepancies (Ex. 29; Tr. 184-185), petitioner telephoned to say that he had discovered on another ledger sheet that he had sold 1300 shares of General Telephone stock but had failed to report the capital gains thereon, and that this explained the differences (Tr. 186, 219-221). Barr met with petitioner again on May 9, at which time an amended return was prepared (Tr. 224); Barr said he would consult with his superiors and advise petitioner whether they would receive that amended return (Tr. 227-228, 522-523).

A few days later, Barr, whose office, as has been noted, was at 180 New Montgomery Street (Tr. 219), telephoned

petitioner to meet on May 14 with him and his superior, Mr. Glenn Adrian, at 100 McAllister Street (Tr. 187, 226-228, 285, 524). In fact, Barr's superior was Group Chief Thomas Haywood (Tr. 215); Adrian was head of the Fraud Group of the Audit Division (Tr. 215, 357).

C. Petitioner's conference with Special Agent Mott

When petitioner arrived on May 14, he met Revenue Agent Barr and Special Agent Mott (Tr. 187, 534). Since Adrian was not present, petitioner thought Mott must be Barr's superior (Tr. 536). This was literally true at the time: The omitted capital gains item in respect of General Telephone stock (Tr. 361; Ex. 36), which was eventually the subject matter of the First Count of the indictment (R. 2-3), had raised the possibility of willful and hence of criminal evasion (Tr. 251, 358). Accordingly, the case had been turned over to Special Agent Mott of the Intelligence Division (Tr. 357). At that point, although Mott had not been in the case during Barr's conferences with petitioner (Tr. 214), he assumed control, with the result that Barr was subordinated to him (Tr. 214, 268, 361). Consequently, as has already been indicated (*supra*, p. 4), it was Special Agent Mott who directed Barr to have petitioner come to the office of the Intelligence Division, and Special Agent Mott who put all the questions to petitioner when he arrived, explaining that he was in charge (Tr. 336).

Petitioner had brought with him an amended return, together with a check for $9992 in respect of the tax deficiency shown by that return to be due (Tr. 294, 532; Ex. 2C). Petitioner's purpose in going to the conference was to file these documents (Tr. 294, 528), and he in fact turned them over (Tr. 310-311).

Special Agent Mott advised petitioner that the purpose of the conference was to determine whether there had been a willful failure to declare income (Tr. 251, 261, 306), and

then, preparatory to taking a question-and-answer statement, warned him of his constitutional right to refuse to answer any questions that might tend to incriminate him (Tr. 233, 265, 375; cf. Tr. 320). Special Agent Mott did not use the words "fraud" or "fraudulent" (Tr. 262, 375), nor did he use the words "criminal" or "prosecution" (Tr. 375), except insofar as criminal prosecution might have been implied or inferred from his use of the word 'incriminate" (Tr. 262, 375).

It is undisputed that Special Agent Mott did not advise petitioner of any right to counsel (Tr. 234, 239, 374, 535). Petitioner himself was unaware of the existence or functions of the Intelligence Division, or of the functions of a Special Agent (Tr. 287-288, 536), and testified that at no time during his interview was any reference made to the Intelligence Division or to Special Agents (Tr. 525). He corroborated Special Agent Mott's testimony that no specific references were made to a fraud investigation or to possible criminal prosecution (Tr. 525).

Petitioner moved to suppress evidence of any statements made by him at the meeting in question, on the ground that they were obtained in violation of his constitutional right to counsel; the motion was denied (Tr. 239-241, 296-308). When the question-and-answer statement was offered in evidence, objection was made on the same ground, and overruled (Tr. 312-316; Ex. 30, Tr. 318-334); and when Special Agent Mott subsequently testified to other statements by petitioner, made later in the same interview (Tr. 334-338), that were recorded on a hidden tape, similar objection was made and again overruled (Tr. 341).

D. Special Agent Mott's use of a concealed tape recorder

Unbeknownst to petitioner (Tr. 239, 269-270, 370-371, 540-541), Mott had, prior to their conference, secretly installed a hidden microphone in the conference room that was wired to a tape recorder in an adjoining room oper-

ated by Special Agent Hilkie (Tr. 236-238, 363-369). Though not a routine practice (Tr. 255), Mott did make the installation with the permission of his superiors (Tr. 257, 366), drilling the holes and running the wires himself (Tr. 259, 366).

Special Agent Mott's stated reason for not advising petitioner of the presence of the microphone attached to the tape recorder was that petitioner might be upset if he knew about it (Tr. 270-271), and, also, that if petitioner knew of the tape recorder, there would be less likelihood of inconsistent statements on his part (Tr. 372).

Affirmatively, Special Agent Mott testified at the outset to three reasons for having the conference secretly taped (Tr. 254, 370): One, to check the accuracy of the stenographer's transcript; two, to determine whether the apparatus he had rigged up was working; and three, as self-protection in the event of future allegations of abusive treatment.

When he thereafter admitted that these three purposes could have been equally satisfied if the taxpayer had been advised of the operation of the recorder (Tr. 371-372), he added a fourth reason, namely, as a safeguard against possible future inconsistent statements by the taxpayer (Tr. 372-374):

> "* * * but I would like to explain my answers.
>
> "Q. All right.
>
> "A. In a criminal case and especially, I mean, as far as Internal Revenue laws, one of the things that we have to find out is whether someone wilfully omitted some income or made other overstatements of expenses or whatever the issue may be, as opposed to making a mistake. And one of the ways of reaching this decision is to test the truthfulness of the person. And if Mr. Rickey had known that the conversation was being recorded, I don't believe that he would ever be able to demonstrate anything different, anything to the contrary.
>
> * * * * *

> "A. I anticipated I may talk to him at a later time and that he might discuss the same thing and see if we have—if the answers are consistent with his first statement."

Significantly, when objection to the concealed recording was first made, the prosecutor had made the same point (Tr. 243-244):

> "With regard to the taping of the conversation, I don't want to belabor that, but I would like to state very briefly that the purpose of Mr. Mott doing that, as I understand his testimony, at the last minute was to prevent a situation where the defendant might make a statement and later deny it, might go so far as to deny he ever said it, and thereby take the position that the agent was not telling the truth. That was not a theoretical doubt, for in this very case, as I understand the defendant's position from the opening statements of Mr. Johnston, they actually allege now that no such statement was ever made. Fortunately for the Government we have that statement on tape."

Thereafter, although the tape recording was not offered in evidence, Mott testified that he had referred to it on two occasions to establish that petitioner had made inconsistent statements after May 14 (Tr. 341, 377). Objection then made was overruled (Tr. 341). The portions containing the alleged inconsistencies recorded a lengthy conversation not included in the question-and-answer statement (Tr. 334-338), which took place after the reporter of that statement had left (Tr. 376-377).

The alleged inconsistencies concerned petitioner's 1961 taxes, the subject of the Second Count of the indictment, on which he was convicted.

E. Petitioner's 1961 tax deficiency

In response to questions by Special Agent Mott on May 14 concerning other tax years, petitioner said he had also discovered a mistake in his tax return for 1961 in con-

nection with sales of some securities held in his wife's name (Tr. 332-333). In conversation at the same meeting subsequent to the completion of the question-and-answer statement, petitioner told about the sales of Island Creek Coal and Coca-Cola shares from his wife's account, and also regarding a sale of additional General Telephone shares on his own account, the proceeds of which went to pay a contractor for work on his house that petitioner mistakenly believed to be a non-taxable exchange (Tr. 334-338). All of these sales, together with a small amount of dividends on his wife's shares, resulted in a deficiency (Ex. 37) that was the subject of the Second Count of the indictment (R. 3).

The record reflects further meetings between Special Agent Mott, petitioner, and petitioner's attorney, Martin Minney, Esq., in July, August, and November 1962 (Tr. 380-387), at one of which petitioner presented a schedule, equivalent to an amended return (Tr. 388, 389), plus a check for the 1961 deficiency, which was deposited to petitioner's account (Tr. 389-391; Ex. 33-35; Ex. T).

It was testified by Special Agent Mott that petitioner gave conflicting accounts concerning the manner in which he had discovered the discrepancies regarding the Island Creek Coal and Coca-Cola shares (Tr. 338-341), testimony that Mott rested on comparisons between what he said petitioner had told him after May 14 and what had been recorded on the hidden tape (Tr. 341, 377). Petitioner's denial of any inconsistency (Tr. 507) must be deemed resolved against him by the verdict.

F. The ruling below

As has been noted (*supra,* p. 3), petitioner was acquitted on the First Count for 1960 and convicted on the second for 1961. On appeal, he urged only the inadmissibility of the statements made by him at the May 14 meeting, on the ground that the accusatory stage had then been

reached, under the doctrine of *Escobedo* v. *Illinois,* 378 U.S. 478, 492, so that he was entitled to counsel as of right. But the court below affirmed, on the authority of its earlier decision in *Kohatsu* v. *United States,* 351 F. 2d 898, *infra,* pp. A2-A14, certiorari denied, June 20, 1966 (No. 965, last Term). A timely petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

Despite the assertion of the court below that its earlier decision in *Kohatsu* v. *United States,* 351 F. 2d 898, certiorari denied, June 20, 1966 (No. 965, last Term) "is not distinguishable and controls here" (*infra,* p. A1), we can easily show that this case, where it was admitted by the Government agent that the purpose of his interrogation was to obtain incriminating statements, is a far more appropriate vehicle for the resolution of what is plainly a recurrent problem; that it presents squarely the precise factor of "affirmative fraud" (*infra,* p. A8) that was absent in *Kohatsu;* and that in the circumstances now presented the fact that petitioner was not in custody precludes neither the application of the principle of *Escobedo* v. *United States,* 378 U.S. 487, 492—that "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate"—nor that of *Miranda* v. *Arizona,* decided June 13, 1966 (No. 759, last Term), requiring precisely the kind of warning that was never given here, and where indeed the giving of that warning was carefully avoided.

First. In our view, the right to counsel attaches, not as was contended in *Kohatsu* nor urged in a recent disinterested study, *The Constitutional Right to Counsel in Tax Investigations,* 33 U. of Chi. L. Rev. 134, 148-149, "whenever any revenue agent contacts the taxpayer," but only when the accusatory stage is reached. And on this

record, on the testimony of the prosecution's witnesses, that stage was reached only when petitioner came under questioning by Special Agent Mott. It was only then that there was on longer any mystery about the identity of the suspected violator or concerning the nature of the offense. If § 7201, I.R.C. 1954 (*infra*, p. A16), had been violated, then the taxpayer—the present petitioner—was responsible. And the deficiency in petitioner's tax, which he frankly admitted (*supra*, p. 5), in respect of which he had brought to his conference an amended return and a check for nearly $10,000 (*supra*, p. 6), and which was stipulated by his counsel at the trial (Tr. 650-651), was the *corpus delicti*.

Only one element was lacking to make out the offense under § 7201, proof of willfulness on petitioner's part, and that is what Special Agent Mott set out to obtain.

1. Mott admitted that he wanted "to concentrate our time on cases that may be prosecution cases" (Tr. 359), and that the purpose of his meeting with petitioner was that, "if possible, of obtaining statements which might be incriminating" (Tr. 253, quoted *supra* at p. 5). Significantly enough, in *Escobedo* (378 U.S. at 491), the police were carrying out "a process of interrogations that lends itself to eliciting incriminating statements."

2. Unbeknownst to petitioner, but with the full approval of his superiors, Mott had secretly installed in the conference room a hidden microphone that was wired to a tape recorder in an adjoining room (*supra*, pp. 7-8). Mott expressly failed to advise petitioner that the conference room was wired for sound, because, as he said, if petitioner had known that fact, there would be less likelihood of inconsistent statements on petitioner's part (Tr. 372-374).

3. The inconsistencies that were in fact developed by Mott with the aid of the secret tape recording bore on the

Second Count of the indictment, on which petitioner was convicted (*supra,* p. 3).

4. While using the word "incriminate" in his warning to petitioner, Mott avoided—a reading of the record conveys the impression that he sedulously avoided—using the words "fraud," "fraudulent," "criminal," or "prosecution" (Tr. 262, 375). In those circumstances, it is surely not hyperbole to assert that the true purpose of the interview was not only effectively but indeed deliberately concealed from the petitioner.

5. Nor was this the extent of the deception practiced on petitioner by agents of the United States. Petitioner had been told by Revenue Agent Barr that the latter would consult with his superiors to advise whether they would receive his amended return (*supra,* p. 5); then petitioner was told to confer with Barr and Barr's superior, Adrian (*supra,* pp. 5-6); but in fact he was confronted by Barr and Special Agent Mott. Mott belonged to the Intelligence Division, Barr to the Audit Division; Barr's group chief was not Adrian, who headed a different unit, the Fraud Group of the Audit Division, but one Haywood (*supra,* p. 6)—and Haywood's name was never mentioned to petitioner.

Mott's presence at the conference in the guise of one of Barr's superiors accordingly constituted a palpable and purposeful impersonation. True, by virtue of par. 678 of the IRS *Manual* (*supra,* p. 4; quoted in full *infra,* Appendix D, p. A16), Mott had by that time actually become Barr's superior. But, needless to add, neither Barr nor Mott undertook to enlighten petitioner concerning the provisions of that paragraph.

Unhappily, similar misrepresentations and near misrepresentations on the part of Government agents are reflected in other criminal tax cases, all however decided

prior to *Escobedo* and *Miranda*.[2] But the approach in all of them seems to be that reflected in a certain instruction to revenue agents that is quoted in *United States* v. *Frank*, 245 F. 2d 284, 286, cited in the note on this page:

> "Be cautious and alert and cultivate the confidence of the taxpayer without tipping your hand as he may cooperate to some degree with you, but if he finds out that you are on his trail or an 'R' sleuth, he may clam up, and from then on your job will be much more tedious and a lot of harder work is ahead of you."

6. Finally—we are almost tempted to add "of course"—petitioner was not advised by Mott of any right to counsel (Tr. 234, 239, 374, 535). For such a warning, plainly enough, would have defeated the purpose of the interview, which, according to Special Agent Mott himself, was that "if possible, of obtaining statements which might be incriminating" (Tr. 253).

We submit that all the statements thus obtained were inadmissible, because by then the accusatory stage had clearly been reached.

Second. Accordingly, the *Kohatsu* case, on which the court below relied, was substantially weaker than the present one, in four respects:

(1) There the special agent was not palmed off as the revenue agent's normal superior; there the court below

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[2] See, *inter alia*, *Application of Bodkin*, 165 F. Supp. 25 (E.D. N.Y.), appeal dismissed, 266 F. 2d 55 (C.A. 2), disapproved in *United States* v. *Sclafani*, 265 F. 2d 408, 414 (C.A. 2), certiorari denied, 360 U.S. 918; *United States* v. *Guerrina*, 112 F. Supp. 126, modified, 126 F. Supp. 609 (E.D. Pa.), first opinion disapproved in *Sclafani*, 265 F. 2d at 414; *United States* v. *Wolrich*, 129 F. Supp. 528, modifying 119 F. Supp. 538 (S.D. N.Y.), remanded for hearing on fraud issue; *United States* v. *Lipshitz*, 132 F. Supp. 519 (E.D. N.Y.); *United States* v. *Frank*, 245 F. 2d 284 (C.A. 3), certiorari denied, 355 U.S. 819 (fraud issue determined adversely to taxpayer by jury and by trial judge).

called attention to the concession of Kohatsu's counsel that the facts did not show sufficient affirmative fraud on the part of the agents to render the fruits of their interviews inadmissible (*infra*, p. A8).

(2) There the special agent never admitted, what Special Agent Mott frankly conceded under oath in this case, that the purpose of his conference with the taxpayer was that, "if possible, of obtaining statements that might be incriminating" (Tr. 253, quoted in full, p. 5, *supra*).

(3) There neither the substance nor the provisions of the IRS *Manual* that gave Special Agents complete control over joint investigations were adduced.

Finally, (4), the interviews in *Kohatsu* were not taken down on a concealed microphone that was wired to a tape recorder in another room.

Third. We do not assert any illegality in respect of the hidden tape recorder as such; under the law as it stood at the time of the interview, such use was proper. *On Lee* v. *United States*, 343 U.S. 747; *Lopez* v. *United States*, 373 U.S. 427; compare *Osborn* v. *United States*, No. 29, this Term, certiorari granted, January 31, 1966 (382 U.S. 1023).

We do say that the use of that recorder, concealed from petitioner's knowledge in order to insure that he might subsequently make inconsistent statements (Tr. 372-374), simply emphasizes that the purpose of the meeting was what Mott had admitted it to be, namely, the obtaining of incriminating statements.

Thus the use of the hidden tape recorder demonstrates in still another aspect the fact that, when petitioner was being questioned, the investigatory stage of the proceeding had been terminated and the accusatory stage was in full swing.

Fourth. Finally, and this is a point to be developed in greater detail in the event that review is granted, we do not

believe that the principle of *Escobedo* and of *Miranda* applies only when the suspect is in custody.

In our view, the critical question is whether the proceedings have ceased to be a general inquiry into an unsolved crime, and have begun to focus on the accused through means of an investigation that lends itself to, or, as here, is expressly designed to, elicit incriminating statements. On that footing, the interest being protected is not dependent on custody.

This is particularly so since, even though the taxpayer is not under physical restraint, there is still a confrontation between an individual and the visible authority of the Government. And, certainly, the advice of counsel is just as necessary during subtle and hence disarming interviews as it is for those undertaken in actual custody. Unless therefore a purely formalistic rule is to be substituted for realistic considerations, the determinative feature in every case must be the purpose of the interrogation. And where, as here, that purpose is to elicit incriminating statements, then the person questioned must be advised, not only of his Fifth Amendment right to avoid incriminating himself, but also of his Sixth Amendment right to counsel as well.

CONCLUSION

The question presented is a recurrent one, and indeed is likely to arise in many if not most criminal tax cases. Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1966.

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,292

KENNETH R. RICKEY, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

[March 16, 1966]

On Appeal from the United States District Court for the Northern District of California, Southern Division

Before: MERRILL, BROWNING and DUNIWAY, Circuit Judges

Per Curiam:

Appellant stands convicted of tax fraud. The sole question presented is whether the District Court erred in denying appellant's motion to suppress certain statements made by him to a special agent of the intelligence (fraud) division of the Revenue Service. Appellant contends that when these statements were made proceedings had progressed from the investigatory to the accusatory stage and, since he had not been advised of his right to counsel, the statements were inadmissible against him under *Escobedo* v. *Illinois*, 378 U.S. 478 (1964).

This court has recently dealt with the question of when, during the course of a tax investigation, the accusatory stage is reached. *Kohatsu* v. *United States*, 351 F.2d 898 (9th Cir. 1965). Appellant seeks to distinguish that case upon the facts. In our judgment it is not distinguishable and controls here.

Affirmed.

APPENDIX B

OPINION IN KOHATSU CASE RELIED ON BY COURT BELOW IN PRESENT CASE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19,738

GEORGE KOHATSU, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

[October 22, 1965]

On Appeal from the United States District Court for the Southern District of California, Central Division

Before: CHAMBERS and DUNIWAY, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

This is an appeal from a judgment of conviction on four counts of a six count indictment. Counts One, Three and Five charged a violation of 26 U.S.C. 7201 (willful attempt to evade or defeat income tax) for the years 1957, 1958, and 1959 respectively. Counts Two, Four and Six charged a violation of 26 U.S.C. 7206(1) (willful falsification of income tax return under penalty of perjury) for the same years. Appellant was acquitted on Counts One and Two involving the year 1957 and convicted on the remaining counts involving the years 1958 and 1959.

Appellant was a member of a partnership engaged in farming and related enterprises, including the operation of a farm labor camp. In 1958 and 1959 the partnership also constructed a trailer park. Appellant was actively engaged in the management of the partnership and maintained and prepared its financial records. His income was his distributive share of the partnership income.

It is undisputed that there was unreported income for the three taxable years, and that for 1957 and 1958 the amounts were substantial. The unreported income consisted of receipts from the sale of farm produce and from the farm labor camp operations, and excess depreciation on the trailer park in 1959. As counsel for the appellant state in their opening brief, the crucial issue was whether appellant's understatements of income were willful.

Appellant sets forth six specifications of error, two of which raise constitutional questions: (1) that evidence was admitted which had been obtained in violation of appellant's right to counsel under the Sixth Amendment,[1] in that appellant was deprived of counsel after the investigation had reached the "accusatory stage"; and (2) that evidence was admitted in violation of the Fourth[2] and Fifth Amendments,[3] in that investigative agents of the Internal Revenue Service failed to warn or advise appellant of his constitutional rights and privileges.

The investigation was commenced in June, 1960, when appellant's income tax return for 1958 was assigned to a revenue agent for audit. For approximately one year periodic meetings were held between appellant and the

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[1] The Sixth Amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

[2] The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

[3] The Fifth Amendment provides in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty or property, without due process of law; . . ."

agent, Valgene T. Stapley. During this period appellant turned over to Stapley numerous bookkeeping records and related materials.

On June 23, 1961, Stapley informed appellant that bank deposit records showed deposits in excess of income reported in appellant's 1958 tax return. At a meeting on July 17, 1961, appellant misrepresented to Stapley a cash payment alleged to have been made to the contractor for the construction of the trailer park.

At a meeting on July 27, 28 or 29, Stapley again told appellant that the receipts shown on the 1958 income tax return did not agree with the bank deposits. Appellant then informed Stapley that $40,500 in cash had been taken from a safe deposit box and deposited in one of the partnership accounts. This statement was reduced to writing and signed by appellant. It was admitted into evidence without objection. In his testimony at the trial appellant admitted that he did not have any cash in a safe deposit box.

In early August, 1961, the investigation was referred to Special Agent Charles Vitello of the Intelligence Division of the Internal Revenue Service. Stapley accompanied Vitello to a meeting with appellant on September 14, 1961, when Vitello presented his "credentials", which were examined by appellant. Vitello conducted a further investigation during September and October, meeting with appellant on September 14 and 20 and October 31. At these meetings he secured additional documents from appellant.

In late 1961, Vitello turned the investigation and various documents over to Special Agent John Lines. Lines continued the investigation, without meeting with appellant until May 10, 1963. On that day appellant had a "question and answer conference" with Special Agent Lines, which was also attended by another agent and a reporter of the Internal Revenue Service. Lines testified that he advised appellant "as to his constitutional rights" and told him

that he did not have to "say anything or offer any document which might tend to incriminate him under any of the federal laws", and that "Mr. Kohatsu said that he understood". Appellant, however, testified that he first learned that he was being investigated with the possibility of criminal prosecution in August, 1963.

Conceding that an internal revenue agent has a right to determine a taxpayer's correct civil liability and in so doing to interrogate the taxpayer and examine his books and records, appellant contends that this "routine civil tax investigation" undergoes a fundamental change when (1) a revenue agent discovers facts indicating substantial unreported income, and (2) the facts are such that the revenue agent suspects fraud. It is appellant's position that when these events occur, the investigation "has begun to focus on a particular suspect" and that from that point "government agents have a duty to inform the taxpayer of his right to counsel, and that they must not elicit further incriminating evidence from the taxpayer until he has been informed of his constitutional rights in specific, understandable terms".

Appellant argues that the investigation "focused on appellant" not later than July 28, 1961, and certainly not later than early August, 1961, when Revenue Agent Stapley referred the investigation to Special Agent Vitello of the Intelligence Division. It is contended that thereafter the agents were no longer "merely attempting to determine appellant's correct tax liability", but rather were "attempting to elicit incriminating statements and documentary evidence from appellant for possible use in a subsequent criminal prosecution".

It is the Government's position that it was Stapley's duty as a revenue agent to audit appellant's returns to determine the correct tax liability for civil purposes, and that it was Vitello's duty as a special agent of the Intelligence Division to investigate alleged violations of matters relating

to income tax and make a recommendation based upon his investigation. The Government contends that both agents were engaged in investigative activities, and that the accusatorial stage had not been reached during any of their investigation.

In support of his contention that his constitutional rights were violated, appellant relies primarily upon Massiah v. United States, 1964, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246, and Escobedo v. Illinois, 1964, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977.[4] Counsel have not cited, nor have we found, any cases applying either Massiah or Escobedo in a case involving an income tax investigation. It is necessary accordingly to consider rather precisely what was held in both cases and their impact upon a case of this nature.

In Massiah the defendant, under indictment for violation of the narcotic laws, had retained counsel and was free on bail when, out of the presence of his attorney, he made incriminating statements to a co-defendent, who, without Massiah's knowledge, had agreed to become a witness for the Government. The statements were overheard by federal agents who had installed radio equipment in the co-defendant's car. The court, in referring to the guarantee of the Sixth Amendment, said:

> "We hold that the petitioner was denied the basic protections of that guarantee when there was used

[4] No objection was interposed on either constitutional ground at the trial. Appellant contends, however, that these errors may properly be considered by this court as "plain errors * * * affecting substantial rights" under Rule 52(b) F.R.Cr.P., particularly in view of the fact that Escobedo v. Illinois was decided subsequent to appellant's conviction. If appellant's constitutional rights were in fact violated, this would be true. See United States v. Atkinson, 1936, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555; Morris v. United States, 9 Cir. 1946, 156 F.2d 525; Billeci v. United States, 9 Cir. 1961, 290 F.2d 628; Dickey v. United States, 9 Cir. 1964, 332 F.2d 773.

> against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." (377 U.S. at 206).

In Escobedo the defendant made incriminating statements during a period of police interrogation after he was arrested and after his request to see his attorney had been denied. In reversing his conviction, the Court said:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S. at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (378 U.S. at 490).

In taking the phrase "focus on a particular suspect" out of context, appellant would extend the rule of Escobedo beyond any logical implication of the effect of that decision. The Supreme Court in Escobedo referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the revenue agents was whether in fact any crime had been committed. The accused had not been indicted or arrested.

A comparable situation was considered by this court in Irwin v. United States, 1964, 338 F.2d 770, 777, where the defendant, convicted of mail fraud, claimed his right to counsel had been violated when a postal inspector submitted an inquiry to the defendant's company and received from the company material connected with the fraudulent scheme. In holding that the evidence of the postal inspector was properly admitted, we said:

> "At that time neither [of the defendants] had been indicted or arrested. The postal inspector was conducting an investigation to determine if appellants were engaging in an unlawful activity. The accusatorial stage of the proceeding had not yet been reached. This being true, the eliciting of the evidence described without revealing to appellants the identity of the investigator or advising them of their right to counsel, and without appellants then having the aid of counsel, was not violative of their rights under the Sixth Amendment, as construed and applied in Escobedo or Massiah or any other Supreme Court decision. Nor were they thereby denied any rights under the Fourth and Fifth Amendments, invoked in appellant's supplemental brief."

The same reasoning applies here with respect to appellant's claim of violation of constitutional rights under both the Sixth Amendment and the Fourth and Fifth Amendments.

Appellant recognizes that under "existing authorities" the "facts do not show sufficient affirmative fraud on the part of the Government agents" to render inadmissible the testimony of the agents and the documents and records they obtained from appellant. He argues, however, that under the "philosophy" of Escobedo, government agents must be "held to the duty, dating from the time they suspect the taxpayer of fraud, of informing him of the criminal nature

of the investigation and his absolute constitutional right to remain silent under the Fifth Amendment".

We find nothing in the Escobedo opinion or its "philosophy" which would impose this duty upon revenue agents during their investigation of a taxpayer's tax returns and records. It is clear that all statements made and all documents delivered were voluntary acts of the appellant and were not induced by stealth, trickery or misrepresentation. As the court well said in United States v. Sclafani, 2 Cir. 1959, 265 F.2d 408, 414-15, cert. den. 360 U.S. 918, 79 S.Ct. 1436, 3 L.Ed.2d 1534:

> "A 'routine' tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission.
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> "Moreover it is unrealistic to suggest that the government could or should keep a taxpayer advised as to the direction in which its necessarily fluctuating investigations lead. The burden on the government would be impossible to discharge in fact, and would serve no useful purpose."[5]

All of the agents properly identified themselves to appellant and disclosed their purpose to audit his returns. Appellant was fully apprised of the Government's concern with the accuracy of his returns. We find no violation of any of his constitutional rights.

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[5] See also Hanson v. United States, 8 Cir. 1950, 186 F.2d 61; Legatos v. United States, 9 Cir. 1955, 222 F.2d 678; Greene v. United States, 2 Cir. 1961, 296 F.2d 841, vacated and remanded on other grounds, 369 U.S. 403, 82 S.Ct. 852, 7 L.Ed.2d 841.

Appellant contends that the trial court erred in excluding expert testimony of an accountant regarding appellant's bookkeeping errors. The errors are conceded, but it is argued that the testimony should have been received in support of appellant's defense that his "understatements of income" resulted from his carelessness and lack of competence as a bookkeeper and not from a willful attempt to evade his income tax.

The appellant used the so-called "Ideal System", a simple type of bookkeeping showing entries in "income received" and "expenses paid" columns. Appellant testified regarding the manner of keeping his books and the methods and procedures followed. He was interrogated on both direct and cross-examination regarding specific entries and his failure to make various entries. Government witnesses were also cross-examined with respect to mathematical errors in appellant's bookkeeping records. Some of these errors were against the taxpayer and some were against the Government. It is apparent from all of this testimony that appellant made many mathematical errors in his computations and that he did not make his entries on a regular systematic basis.

Appellant argues that the expert accountant who had made a thorough analysis of appellant's books and records should have been permitted to testify to "his observations concerning the manner in which appellant kept his 'Ideal System' ".[6] In his reply brief appellant argues that he

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[6] The purpose of the testimony is set forth in the following colloquy:

"MR. CAPS: Would you hand the witness Exhibit Z, please, the Ideal book.

(Document handed to the witness.)

"BY MR. CAPS:

Q During your audit and review of the books and records of George Kohatsu, did you have occasion to familiarize yourself with Exhibit Z in front of you?

was attempting to show by expert testimony *facts* (not opinion) "that appellant made numerous mistakes in keeping his books, from which the jury could infer a lack of willfulness."[7]

As noted supra, there was substantial evidence in this case that errors were in fact made. No expert testimony was necessary to show these *facts*. There was also substantial testimony from the appellant himself as to the *manner* in which he kept his books. It was for the jury to determine whether the errors and the failure to report income resulted solely from bookkeeping carelessness or from a willful attempt to evade income tax. The accountant's opinion or conclusion that the errors resulted from appellant's carelessness, without intent to evade his income tax, would have been improper as going beyond the scope

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A I certainly did.

Q What did you find regarding the manner in which that record was kept?

A There are many instances—

MRS. DUNNE: Your Honor, I am very sorry to renew this objection, but I do not see any relevancy for telling the manner in which this record is kept. The issue is what income was reported or not reported, and what tax liabilities there are.

THE COURT: The objection is sustained.

MR. CAPS: There is no issue with respect to the amount of income that was reported; the only issue in this case is the reason for the omission, and I submit that in this respect that the bookkeeping records and the manner in which they were kept is of vital importance to the defendant.

THE COURT: The objection is sustained."

[7] Appellant relies upon a number of civil tax cases holding that it is proper to consider the taxpayer's carelessness and ineptitude in keeping books in determining the issue of willfulness. It was proper for the jury to consider the numerous errors in bookkeeping in determining the issue of willfulness in this case. While the court's instructions on this point are not a part of the record, no exceptions were taken to the instructions, and presumably the jury was properly instructed with respect to the issue of willfulness.

of his expert competence.[8] Viewing the evidence as a whole, we conclude that there was no prejudicial error in excluding the accountant's testimony.

Appellant next argues that the trial court erroneously excluded testimony of the appellant and another witness offered to show that appellant cooperated with Government agents during the investigation. He relies primarily upon the cases of United States v. Matot, 2 Cir. 1944, 146 F.2d 197, and Heindel v. United States, 6 Cir. 1945, 150 F.2d 493. Both cases are distinguishable for the reasons set out in Hayes v. United States, 10 Cir. 1955, 227 F.2d 540, 543,[9] where the court said:

> "When acts of subsequent conduct are offered to prove absence of evil intent, the trial court is vested with considerable discretion in admitting or refusing to admit such evidence. At best, the offer to pay after the defalcation or fraud has been established has but small probative value for the purpose of showing lack of evil intent. The trial court must consider the circumstances surrounding the offer and its exclusion of such evidence does not constitute reversible error,

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[8] It is of course recognized that an expert accountant may properly summarize voluminous records and interpret and explain certain evidence within the province of his expert competence. Cf. United States v. Willis, 3 Cir. 1963, 322 F.2d 548, and cases there cited. See also Bostwick v. United States, 5 Cir. 1955, 218 F.2d 790; Blumberg v. United States, 5 Cir. 1955, 222 F.2d 496.

[9] In distinguishing Matot and Heindel the court noted that in both cases the defendant had made a prompt effort to rectify the situation as soon as his wrongdoing was brought to light, whereas in Hayes the defendants made no effort to pay the tax until some years after the alleged fraud was brought to their attention. In the instant case the excluded testimony related to events occurring long after the Government began its investigation and at a time when the defendant knew his returns were being audited.

unless under all the circumstances of the case it clearly should have been admitted."[10]

After reviewing the evidence in this case, including the testimony of the Government witnesses relative to their interviews with appellant, we conclude that appellant was not prejudiced by the exclusion of the offered testimony regarding his cooperation in the investigation.

Appellant next claims prejudicial error in comments of the trial court indicating (1) bad faith on the part of appellant's counsel, and (2) lack of probative force in appellant's evidence. Appellant specified three alleged improper comments of the court. No objection was taken to two of the comments.

From our examination of the record as a whole, including the comments specified by appellant, we find no prejudicial error.[11] The remarks did not convey to the jury any impression of the trial judge's personal feelings as to the guilt or innocence of appellant or impugn the

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[10] See also Bateman v. United States, 9 Cir. 1954, 212 F.2d 61, 68, where this court in a tax fraud case held that the trial court had properly excluded evidence that the taxpayers had filed petitions in the Tax Court protesting the assessment of tax deficiencies, on the ground that the offered evidence had "no probative value in establishing appellants' state of mind at the time of the alleged criminal act * * *". We said further: "Furthermore, the acts appellants rely upon to show good faith in 1946 and 1947 occurred in 1950, long after the Government had commenced its investigation and at a time appellants knew their returns were being audited." (212 F.2d at 69).

[11] As this court said in Bush v. United States, 9 Cir. 1959, 267 F.2d 483, 488: "Merely because a statement is made or question asked by court or counsel in the heat of a spirited trial which subsequently in the cool ivory tower of appellate court chambers seems inappropriate does not make the stating nor the asking prejudicial error." See also Todorow v. United States, 9 Cir. 1949, 173 F.2d 439.

integrity of either counsel. Moreover, at the close of the evidence, the court admonished the jury to disregard any comment which might indicate his opinion regarding the case.[12]

Finally, appellant contends that the trial court erroneously restricted appellant's cross-examination of certain Government witnesses. It is well settled that the extent of cross-examination rests in the sound discretion of the trial judge.[13] From our examination of the record we are satisfied there was no abuse of that discretion.

Finding no prejudicial error, we affirm.

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[12] The court said:

"You are instructed that if I have said or done anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion. I have not expressed, nor intended to express, nor have I intimated or intended to intimate, any opinion as to what witnesses are, or are not worthy of belief, what facts are or are not established; or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it."

[13] See Beck v. United States, 9 Cir. 1962, 298 F.2d 622, 629; Enriquez v. United States, 9 Cir. 1961, 293 F.2d 788, 794; Robles v. United States, 9 Cir. 1960, 279 F.2d 401, 405, and cases there cited.

APPENDIX C

JUDGMENTS BELOW

(1) Judgment of Affirmance

[Caption omitted]

APPEAL from the United States District Court for the Northern District of California, Southern Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the District Court in this Cause be, and hereby is affirmed.

Filed and entered March 16, 1966

(2) Order Denying Rehearing

[Caption omitted]

Excerpt from Proceedings of Thursday, June 2, 1966

Before: MERRILL, BROWNING and DUNIWAY, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellants filed April 14, 1966, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

1. Section 7201, I.R.C. 1954, provides as follows:

> **"§ 7201. Attempt to evade or defeat tax**
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> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

2. The text of paragraph 678 of the Manual of Instructions for Revenue Agents, relating to the duties of agents in joint investigations, which is set forth in *United States* v. *Lipshitz*, 132 F. Supp. 519, 521 (E.D. N.Y.), reads as follows:

> "In joint investigations the Special Agent will be responsible for the criminal features of the case and for the procurement of appropriate proof to establish the criminal charge should prosecution be authorized. The Internal Revenue Agent participating in such investigation will be responsible for the audit features of the case and for the preparation of a record of the proof to support the ad valorem addition to the tax. In such an investigation the Special Agent will be responsible for the method of procedure in, and conduct of, the investigation. The Special Agent in charge will be the officer responsible for a recommendation for or against criminal prosecution and may in his discretion recommend the assertion of an ad valorem addition to the tax in cases where criminal prosecution is not recommended."

3. The functions of the Intelligence Division in the Office of a District Director of the Internal Revenue Service appear at 26 Fed. Reg. 6372, 6393 (Department of the Treasury/Internal Revenue Service/Organization and Functions; July 15, 1961) in these terms:

> "1118.6 *Intelligence Division.* (1) The Intelligence Division investigates alleged criminal violations of the tax statutes, including racketeer and wagering tax cases, but excluding alcohol, tobacco and firearms tax cases.
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> "(2) The Division evaluates allegations and indications of tax law violations and determines investigations to be undertaken. It makes recommendations as to the disposition of cases investigated, including recommendations of criminal prosecution, and the assertion of civil penalties. It provides assistance to U.S. Attorneys and the Regional Counsel in the trial of cases. The Intelligence Division consists of groups of special agents."